

39.40

16<sup>th</sup> January  
1771.

See

15<sup>ter</sup> Februar.

Monboddo. 5th  
then a short day  
with a journey of  
3 years more  
finds a way to  
some noble day  
3 years, it has been  
said.

Put her with a new  
 acquaintance and  
 left before 4 years  
 for a new woman 5  
 Orléans is not after  
 4 months gone  
 in a way of  
 her, he would say  
 he'd accordingly  
 possibly difficult  
 for discovery  
 (1802) & (1803)

1730  
P. 100 - 1st Decem.  
to relating the monthly  
acts, record with a  
general acknowledgment  
of noble and generous  
charity & nobility.  
Hence from instance  
of letters as an example  
I would want to be  
of the best for my  
letters on each of the  
officers of the  
and without flattery  
very much.

Longman 7mo. 1841  
 1/2 page in front rough  
 large of numbers  
 The following are the  
 a list for the  
 has in it some of  
 an 31. 1770. being by purchase  
 has in it some of the  
 say it is old the year  
 a ballad.

Yellow in a row when  
seen, and of the young  
at least, part of the  
one, and the other, &  
the same.

" That

Adm. Dep. (asked) Pres. Hooley

"That the defender does not deny any of the articles of the  
 "account libelled on; and that his letter of the 21st of No-  
 "vember 1768, bears only a promise to settle accounts; yet  
 "as that letter bears date after the prescription of three years  
 "from the last article was run, consequently, in settling the  
 "accounts, the defender did not pass from his legal excep-  
 "tions; and that the defender, when he acknowledges the  
 "furnishings, avers, that he paid 120 pounds in part, and  
 "the pursuer does not offer to redargue that allegation, by  
 "the defender's writ or oath, sustains the defence to the ex-  
 "tent of the L. 120. But finds the defender liable for the  
 "balance of L. 13:4:6 $\frac{1}{4}$  Sterling, with interest from the  
 "14th of February 1765, being one year after the last ar-  
 "ticle of the account; and decerns."

Against the above interlocutor the petitioner preferred a  
 Aug 4 1770. representation; and the Lord Ordinary, of this date, was  
 pleased to pronounce the following interlocutor.

"The Lord Ordinary having again considered this repre-  
 "sentation, with the answers and replies, and specially, that  
 "the defender's letters promising to settle accounts, were  
 "wrote after the three years were expired, so cannot be  
 "pleaded by the pursuer, to have occasioned the delay of the  
 "process till the prescription was run; and as it is not al-  
 "leged, that the defender had ever seen the account pur-  
 "sued on, so that the defender, who admits he owes a small  
 "balance to the pursuer, cannot be understood, by agreeing  
 "to settle accounts, to have admitted the justice of this whole  
 "account, and to have passed from any objections he had a-  
 "gainst the extent of it, adheres to the former interlocutor,  
 "and refuses the desire of the representation."

Against the above interlocutor the petitioner preferred a  
 third representation, and amongst therewith, there was produ-  
 ced another letter from the defender, dated 22d January 1765,  
 while the account was current, directed to the defunct him-  
 self, desiring to send his account, and promising payment;  
 and in this letter the defender commissions some more goods,  
 which were also sent him.

The

The Lord Ordinary appointed the representation to be answered, and the answers specially to obviate the argument from the defender's letter to Mr Macalister in the 1765, before the prescription was run, and to set forth specially the time, manner, and place, the payments controverted are said to have been made: and the defender having in his answers descended, that the payment had been made in November or December 1765, and that he got the money from his agent, Dec. 15. 1770 for a draught on Henry Davidson, his Lordship pronounced this other interlocutor.

The Lord Ordinary having again considered this representation, with the answers, and that the letters now founded on by the pursuer, by the defender to the deceased Mr Macalister, in the 1765, which while commissioning certain goods therein mentioned, likewise desires him to send his account, telling him he was to get cash, and therefore desires the account to be sent in a few days after, is not sufficient to make the claim last for forty years; but that the same having not been sued for within three years of the last article, is now only to be ascertained by the defender's writ or oath; and therefore adheres to the former interlocutor, and refuses the desire of the representation.

The petitioner begs leave to bring these interlocutors under your Lordships review; as he humbly apprehends, there is not, in the present case, any room for the plea of prescription.

The two first interlocutors pronounced by the Lord Ordinary, seem to have been founded on this special circumstance, That the letters produced not having been written within three years of the furnishings, were not sufficient to interrupt the triennial prescription. But the force of this defence is removed by the letter written by the defender to the defunct upon the 22d January 1765, while the account was current; in which he desires his account to be sent, and promises payment.

With regard to the *ratio decidendi* in the last interlocutor, That the letter in 1765 is not sufficient to interrupt the prescription, the petitioner would with great deference observe, that the act of parliament which allows the triennial prescription, regards only such furnishings as are to be proved by witnesses,



witnesses, and not where furnishings are supported by written documents. And in the present case, the petitioner humbly apprehends, that the defender's letter written in 1765 acknowledging the account, and promising payment, is such a written document as to bar the plea of prescription; as has been repeatedly found by your Lordships. The petitioner will mention a case or two, as taken down in the Dictionary.

"Furnishing, after three years, cannot be proved by witnesses, either by way of action or exception; but a man having wrote a letter to a merchant, desiring him to furnish necessaries to his wife, and to place it to his account, the pursuit here being founded upon writ, the quantities were found provable by witnesses, even after three years; 5th July 1681, Dickson *contra* Macaulay."

Here your Lordships will please to observe, that a letter giving a general commission to furnish, was sustained as a written document, sufficient to interrupt the prescription with regard to subsequent furnishings; and the present case is much stronger, as the acknowledgement in the letter 1765 is *subsequent* to the furnishings.

That the letter mentions only an account in general, without referring to the particular articles, cannot avail the defender. It is the usual way of writing on this subject; and it would have been very extraordinary, if a customer, in a letter promising payment of his account, should take notice of all the different articles furnished. In the case just mentioned, the commission to furnish was in general. And your Lordships have been in use to find, that a general acknowledgement of an account due, was sufficient to interrupt the triennial prescription; particularly the 20th February 1708, Elliot *contra* Veach. The case is taken down by Mr Forbes thus. "In the pursuit at the instance of Gideon Elliot, against the representatives of Captain William Veach, for payment of an account of medicaments furnished by the pursuer to the defunct, the Lords found, That the three years prescription of the said account, *quoad modum probandi* by witnesses, was interrupted by a letter from him "to

to the pursuer, acknowledging debt in general, and that  
 "he had ordered his payment by a friend." And the same  
 was found, Feb. 30. *Chalmers contra Ogilvie*. Dict. vol. 2.  
 p. 129.

It was alleged by the defender, That the reason why the  
 prescription was found interrupted by the missive in the case  
 of Veach, was because the action was not brought against  
 Veach himself, but against his representatives. But there  
 is no solidity in this distinction: for if the action was pre-  
 scribed *quoad* Veach himself, the case of his representatives  
 was still more favourable. Neither was it competent for  
 them to plead prescription but as coming in place of the  
 defunct; nor is it alleged, that the like speciality occurred  
 in the case of Chalmers, though the same decision was pro-  
 nounced.

From what has been said, and the authorities referred to,  
 the petitioner apprehends it is clear, that the defender is not  
 intitled to plead prescription, either with regard to those fur-  
 nishings which were made prior to the letter 1765, or in con-  
 sequence of it, as the letter itself is such a written document  
 as to keep them from falling within the act of parliament.

It remains only therefore to take notice of such furnishings,  
 made subsequent to January 1765, as were not made in con-  
 sequence of the above letter. And with regard to these, the  
 petitioner submits it to your Lordships, whether the defend-  
 er's repeated letters to himself, promising to settle accounts,  
 not one of which makes mention of this additional payment,  
 are not sufficient to bar prescription with regard to them  
 also.

The plea of prescription is at best but an odious one,  
 not founded on justice, but introduced by positive law solely,  
 and founded on the presumption, that the debt is not due,  
 because not demanded within a certain time. In order,  
 therefore, that the defender should avail himself of this plea,  
 it will be incumbent upon him to bring himself within the  
 intendment of the act; which he cannot do; because it is

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clear

clear from his own letters, that the account was not paid within the three years: so that the presumption must, according to the rule of law, yield to the matter of fact. Nor can it make any difference, that these letters were not written within the three years. They fall to be considered in the same light as promises of payment made after the three years are elapsed. And the petitioner apprehends, the defender would not be allowed to avail himself of the plea of prescription in that case. Had there been no letter at all under the defender's hand, it would have been still competent to the petitioner to prove these furnishings by the defender's oath; but the letters ought to have some effect; and if so, they can, in his apprehension, have no other than that of interrupting the prescription.

The petitioner would not be understood to make any personal objection to referring the whole to the defender's oath; fully persuaded, that he would say nothing but the truth: but as a trustee for third parties, he thinks it his duty to state such objections as occur to him in point of law, why a reference to oath ought not to be made in the present case.

Upon the whole, the petitioner flatters himself, your Lordships will be of opinion, that the defender is not intitled to plead prescription, at least *quoad* such furnishings as were made prior to, and in consequence of, the defender's letter in 1765.

*May it therefore please your Lordships, to alter the interlocutor above complained upon; and to find, That the defender is not intitled to plead the triennial prescription; at least, in so far as regards the furnishings made prior to, and in consequence of, the defender's letter of date the 22d January 1765.*

According to justice, &c.

ROB. CAMPBELL.